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ECCHR

IN THE CENTRAL COURT FOR
PRELIMINARY CRIMINAL PROCEEDINGS NO. 6

MADRID

PRELIMINARY PROCEEDINGS
SUMMARY PROCEDURE 134/2009

JOINT EXPERT OPINION: LIABILITY OF THE SIX DEFENDANTS

by:

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4 January 2011

HOLDING THE "BUSH SIX" LAWYERS ACCOUNTABLE FOR TORTURE AND OTHER WAR CRIMES UNDER INTERNATIONAL CRIMINAL LAW

"The charge, in brief, is that of conscious participation in a nationwide governmentally organized system of cruelty and injustice, in violation of the laws of war and of humanity, and perpetrated in the name of law."
United States v. Altstoetter, 3 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1951), at 985.

Introduction:

This legal opinion is submitted in support of the 17 March 2009 complaint currently pending before the Central Court for Preliminary Criminal Proceedings No. 6, filed against the following former American government lawyers: David ADDINGTON (former Counsel to, and Chief of Staff for, former Vice President Cheney); Jay S. BYBEE (former Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice); Douglas FEITH (former Under Secretary of Defense for Policy, Department of Defense); Alberto R. GONZALES (former Counsel to former President George W. Bush, and former Attorney General of the United States); William J. HAYNES (former General Counsel); and John YOO (former Deputy Assistant Attorney General, Office of Legal Counsel, U.S. Department of Justice) – hereafter the "Bush Six".[1] The complaint charges them with having materially contributed to a systematic plan of torture and cruel, inhuman, and degrading treatment on persons detained by the United States in the context of the so-called "War on Terror". Those subjected to such treatment include, but are not limited to, former Guantánamo detainees Hamed Abderrahman Ahmed, Ikassrien Lahcen, Jamiel Abdul Latif Al Banna, and Omar Deghayes.

The present expert opinion, presented jointly by the Center for Constitutional Rights (CCR) and the European Center for Constitutional and Human Rights (ECCHR), aims at providing the Court with the **legal framework** according to international law under which government lawyers may be held individually and criminally accountable for torture and cruel, inhuman or degrading treatment, war crimes, or crimes against humanity. To illustrate the legal arguments in light of this unique case, **key evidence** relating to the defendants will be detailed throughout the analysis. The present opinion is not intended to be a comprehensive briefing of all relevant evidence or legal authorities.

The complaint pending before Central Court 6 draws upon a significant number of documents produced by various agencies and departments of the U.S. government, including some documents written or otherwise prepared by the defendants, that evidence that without the legal opinions of the Bush Administration lawyers named here as defendants, many of the gravest

[1] The Center for Constitutional Rights and the European Center for Constitutional and Human Rights recognize the significant contribution of Claire Tixeire to this Opinion.

crimes perpetrated against detainees under US control, would not and could not have occurred. Plaintiffs argue that the defendants must be held to account not only because it was a foreseeable consequence that the legal positions taken in their various memoranda would lead to torture and other crimes; but also because enabling these crimes *was* their very purpose in conspiring to write these opinions.

Our submission is divided into three sections. First, we examine the prosecution of attorneys in the Nuremberg Trials to demonstrate how Nazi government lawyers were found guilty and held personally liable for conspiracy to war crimes (1). This historical precedent is of direct relevance to the current case. Specifically, these cases demonstrate that lawyers can be held criminally liable if they *knowingly* give unwarranted and false legal advice in situations where it is foreseeable that serious harm will result from that advice, or where they do so as part of a conspiracy to enable illegal conduct. Crucially, the fact that the defendants acted in a legal capacity does not shield them from prosecution.

In the subsequent two sections we detail the two types of liability under international criminal law that we submit are most applicable to the current proceedings: aiding and abetting (2) and joint criminal enterprise (3). After examining the requisite elements of both offences, we show that the Bush lawyers fully knew that their opinions would have a substantial effect on the perpetration of crimes – as such, they aided and abetted crimes. Furthermore, evidence shows that they were distorting the law towards a specific result and that they did so as part of a conscious plan to enable torture and other crimes - thus rendering them accountable under joint criminal enterprise.

Finally, we conclude that there are firm foundations for finding the defendants in this case to be guilty of serious crimes. Given that the United States is utterly unwilling to prosecute the defendants for their criminal acts, as detailed in our earlier Supplemental Opinion of 14 December 2010, we reiterate our request for Central Court 6 to immediately proceed with the opening of an investigation in this matter.

1. Relevance of the Nuremberg Precedent to the Bush Six Case

While it may be unusual for lawyers to be charged with complicity in crimes, it is not unprecedented. Lawyers have been sued for crimes arising from legal advice. For example, and naturally so, attorneys can be found guilty of conspiracy if they provide a client wanting to launder money with the legal loopholes that would enable illegal financial transactions.[2] The most high-profile instance of the prosecution of attorneys, though, arises from Nuremberg.

The Nuremberg International Military Tribunal's jurisprudence provides indeed a direct precedent for the prosecution of government lawyers who individually and consciously

[2] For a US precedent, *see, e.g.*, *United States v. Arditti*, 955 F.2d 331 (5th Cir. 1992).

participated in violations of international law. The 8 August 1945 London Charter of the Tribunal, based on existing international customary rules recognized that individual liability had to go beyond the responsibility of those who directly perpetrated or carried out the crimes. It stated:

> Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.[3]

The Nuremberg precedent – both the Charter and the case law – is highly relevant here as it is considered a source of international customary law. The World War II cases have indeed paved the way for an international criminal justice system, and the two *ad hoc* international tribunals and the Rome Statute have used this precedent as a key source of guidance in advancing individual criminal liability.

In both the *Justice* and *Ministries* cases, never was the fact that the defendants acted in a legal and official capacity considered as an obstacle in holding them to account. On the contrary, the significant contribution to the crimes the lawyer-defendants made because of their legal role was central to establishing their degree of responsibility.

1.1. Government Lawyers Guilty of Contributing to International Crimes for Having Attempted to Provide Legal Cover for Violations.

In the *Justice Case*,[4] also referred to as the *Judges Case*, the sixteen defendants, who were all but one trained lawyers in the Reich Ministry of Justice, were charged with using the legal system as a tool for implementing the Holocaust.[5] The decision reads: "The prostitution of a judicial system for the accomplishment of criminal ends involves an element of evil to the State which is not found in frank atrocities which do not sully judicial robes."[6]

The defendants, labeled as a "dishonor to their profession,"[7] were "called to account for violating constitutional guaranties or withholding due process of law,"[8] because they "seized control of

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[3] Charter of the International Military Tribunal, Annex of the Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 8 August 1945, 82 U.N.T.S. 279, Art. 6.

[4] *United States v. Altstoetter*, *in* 3 Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No. 10 (1951), *available at* http://www.mazal.org/NMT-Home.htm [hereinafter *Justice Case*].

[5] *Justice Case*, *supra* n. 4, at 15-26. *See, e.g.,* page 15-16, para. 5: "a part of the said common design, conspiracy, plans, and enterprises [was] to enact, issue, enforce, and give effect to certain purported statutes, decrees, and orders, which were criminal both in inception and execution, and to work with the Gestapo, SS, SD, SIPO, and RSHA for criminal purposes, in the course of which the defendants, by distortion and denial of judicial and penal process, committed the murders, brutalities, cruelties, torture, atrocities, and other inhumane acts […]."

[6] *Id.*, at 1086.

[7] *Id*. at 32.

Germany's judicial machinery and turned it into a fearsome weapon for the commission of the crimes charged in the indictment."[9] American prosecutor Telford Taylor stated that the victims were "judicially murdered by certain of the defendants using a variety of legalistic artifices."[10] Concrete ways in which the lawyers contributed to the criminal regime included the use of *ex post facto* laws, the implementation of racially discriminatory legislation, the extension of German law to annexed territories and the "submergence" of the judicial system to Nazi control.[11]

Defendant Herbert Klemm, for example, had taken a legal position approving the non application of the German Criminal Code to Poles, Jews, and gypsies, which led to countless crimes against these groups. Franz Schlegelberger, Nazi acting Minister of Justice and the highest-ranking defendant, had "supported the pretension of Hitler in his assumption of power to deal with life and death in disregard of even the pretense of judicial process. By his exhortations and directives, Schlegelberger contributed to the destruction of judicial independence."[12] In other words, Schlegelberger advocated for the Fuehrer's Principle – a theory which mirrors the Commander-in-Chief theory advanced by defendant John Yoo in many of his legal opinions.[13] Both Klemm and Schlegelberger were sentenced to life imprisonment.

The Night and Fog (*Nacht und Nobel*) decree, which called for the punishment by death in complete secrecy of the Nazi resistance and directly resulted in the killings and enforced disappearances of thousands, provides yet another example of the involvement of the lawyers in the furtherance of the Nazi program.[14] The tribunal pointed to the "large part which the Ministry of Justice played in the Nacht and Nobel program," especially international law specialists.[15]

The defendants were also involved in the provision of "legal cover" to the criminal act of transferring inmates to concentration camps and the creation of a legal system of persecution which ultimately amounted to a crime against humanity. In fact, the prosecution stated:

> Throughout the war, the administrative and penal branches of the Ministry of Justice *continued to cooperate in protecting loyal followers of the Third Reich from criminal prosecution* for their innumerable atrocities against Poles, Jews, and other "undesirable

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8 *Id*.

9 *Id*. at 40.

10 *Id*. at 78-79.

11 *Id*. at 69.

12 *Id.* at 1083.

13 For an analysis of Yoo's theory of the Commander-in-Chief in light of the Fuehrer Principle, *see* Joseph Lavitt, *The Crime of Conviction of John Choon Yoo: The Actual Criminality in the OLC During The Bush Administration*, 62 Me. L. Rev. 155 (2010).

14 The prosecution explained, "Perhaps never in world history has there been a more perverted and diabolical plot for intimidation and repression than this." *Justice Case*, *supra* n. 4, at 75.

15 *Id.* at 76.

> elements." At the successful conclusion of the Polish campaign, *an unpublished decree suspended all prosecutions* against racial Germans in Poland for any punishable offenses which they might have committed against Poles during the Polish war "due to anger aroused by the cruelties committed by the Poles." In 1941, the defendant Schlegelberger assured Rudolf Hess that he would consider "benevolently" an amnesty in any particular case of atrocities committed after the conclusion of the Polish campaign.[16] (Emphasis added)

As American legal scholar Jens David Ohlin explained, even though the Nazi defendants in this case, like the Bush Six, had not personally carried out the crimes, they were held to be complicit because "[b]y virtue of their training and legal experience, the officials at the Ministry of Justice knew that their actions, though ostensibly merely armchair lawyering, would nonetheless "probably cause death of human beings, subjected to such a perverted judicial system.""[17]

1.2. Providing Legal Advice that Justifies and Leads to War Crimes Is Criminal

The *Ministries Case*[18] represents precedent for the argument that complicity includes providing legal advice for government actions that violate international law. The defendants in this case were Nazi government officials, including those of the Foreign Office. The Tribunal pointed to the fact that the Foreign Office's diplomats were international law experts responsible for advising higher officials in relation to the legal consequences of their foreign policy decisions – a role similar to those played by the Bush Six.

The tribunal stressed that,

> The only advice [the Foreign Office] could give within its sphere of competence and the only objection it could raise from an official standpoint was that the proposed program did or did not violate international law, and whether, irrespective of its legality, unfavorable foreign political developments would arise.[19]

The government officials' failure to do so, led to their criminal liability under international law for serious crimes committed as a result of the policies based on their opinions.

1.3. The Duty to Abide by the Laws of War

In light of the facts of the Bush Six case, it is worth discussing yet another Nuremberg case. General Marshal Wilhelm Keitel, German Chief of Staff of the High Command of the Armed

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16 *Id*. at 55-56.

17 Jens David Ohlin, *The Torture Lawyers*, 51 Harv. Int'l L.J. 193, 249 (2010).

18 *United States* v. *Weizsaecker*, *in* 12-14 Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10 (1951) [hereinafter *Ministries Case*].

19 *Id*. at 959.

Forces, was tried and found guilty in 1945 of conspiracy to commit international crimes.[20] With regards to the "Murder and ill treatment of prisoners of war" as part of the charge of conspiring to commit war crimes, the Tribunal found that General Keitel had denied Russian soldiers Geneva law of war's protections and refused to give them prisoner of war status, and that this directly led to crimes being perpetrated against them. On 8 September 1941, Keitel's *Oberkommado der Wehrmacht,* which advised Hitler on important military questions, issued a regulation providing that Russian soldiers "would fight by any methods for the idea of Bolshevism and that consequently they had lost any claim to treatment in accordance with the Geneva Convention."[21]

A few days following the release of Keitel's regulation, Admiral Canaris of the *Abwehr* (the German military intelligence organization) sent Keitel a memorandum of protest explaining that the order was in "direct violation of the general principles of International Law."[22] The Nuremberg Tribunal Charges explained that the Admiral "pointed out that, while the Geneva Convention was not binding between Germany and the USSR, the usual rules of International Law should be observed; that such instructions […] would result-in arbitrary killings." Keitel refused to reconsider and responded by a handwritten comment saying: "The objections arise from the military concept of chivalrous warfare. This is the destruction of an ideology. Therefore I approve and back the measures."[23]

During his testimony in Nuremberg, Keitel stated that the Geneva Convention relative to the Treatment of Prisoners of War of 1929 was "*obsolete*."[24] That remark was cited as an aggravating circumstance when Keitel was found guilty of all charges.

1.4. Direct Parallels to the Bush Six

There are many points of relevance that can be drawn from the Nuremberg precedent to the Bush Six case, whether it is with regards to: the specific roles played by the defendants – as advisers or as lawyers; the expectations and responsibilities that arise from these functions; the defendants' conscious participation to the perpetration of serious international crimes, or their theories to justify violations of the laws of war.

International scholar Jordan Paust wrote, in reference to the Bush administration government lawyers, that "Not since the Nazi era have so many lawyers been so clearly involved in

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[20] Nuremberg Tribunal Judgment, in Nazi Conspiracy and Aggression, Vol. II USGPO Chapter XVI, Washington, 1946, pp.528-546, *available at* http://www.ess.uwe.ac.uk/genocide/keitel2.htm.

[21] Nuremberg Tribunal Charges, in Nazi Conspiracy and Aggression, Vol. II USGPO Chapter XVI, Washington, 1946, pp.528-546, *available at* http://www.ess.uwe.ac.uk/genocide/Keitel1.htm.

[22] *Id*.

[23] *Id*. (EC-338).

[24] Quoted in Scott Horton, *A Nuremberg Lesson*, L.A. Times, 20 Jan. 2005.

international crimes concerning the treatment and interrogation of persons detained during war."[25] The following set of examples provides a clear illustration of the parallels that can be drawn.

On 9 January 2002, defendant John Yoo, Deputy Assistant Attorney General in the Office of Legal Counsel (OLC) within the US Department of Justice, issued a memorandum to the attention of defendant Haynes, General Counsel at the US Department of Defense. The memo argued that the 1949 Third Geneva Convention relative to the Treatment of Prisoners of War did not apply to the conflict with Al Qaeda or the Taliban, and that neither did Common Article 3 to the Conventions, which provides for the minimum safeguards to be observed at all times, in particular the humane treatment of both civilians and combatants.[26] Upon this advice and the additional oral advice of Defendant Alberto Gonzales, Chief White House Counsel to the President, President George W. Bush decided that the Third Geneva Convention did not, in fact, apply to the conflict with al Qaeda or members of the Taliban, and that they would not receive the protections afforded to prisoners of war.[27] On 22 January 2002, defendant Jay Bybee, Assistant Attorney General confirmed this legal advice in an additional memorandum.[28]

Fierce opposition was voiced from within the Bush Administration against that decision, especially from Secretary of State Colin Powell and the Department of State Legal Adviser. Yet, defendant Gonzales, in a 25 January 2002 memo ghost-written by defendant Addington,[29] asserted that the "new paradigm" of the "war on terror" makes certain provisions of the Geneva Conventions "quaint" and indeed "renders *obsolete* Geneva's strict limitations on questioning of enemy prisoners."[30] (Emphasis added). Gonzales recommended that President Bush effectively put aside the Convention because "the war against terrorism is a new kind of war."[31] Gonzales

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[25] Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 Colum. J. Transnat'l L. 811 (2005).

[26] John Yoo & Robert J. Delahunty, Memorandum for William J. Haynes II, General Counsel, Department of Defense, *Application of Treaties and Laws to al Qaeda and Taliban Detainees* (9 January 2002), at 1,11, *available at* http://upload.wikimedia.org/wikipedia/en/9/91/20020109_Yoo_Delahunty_Geneva_Convention_memo.pdf.

[27] *See* Senate Armed Services Committee, *Inquiry into the Treatment of Detainees in U.S. Custody*, 20 November 2008, at 1 [*hereinafter* "Senate Armed Services Report" or "SASC Report"]. The full text report, with redacted information, was released in April 2009 and is available at: http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf.

[28] Memo from Assistant Attorney General Jay Bybee to Alberto Gonzales and William Haynes II, *Application of Treaties and Laws to al Qaeda and the Taliban Detainees* (22 January 2002), *available at* http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf.

[29] Jane Mayer, *The Dark Side* 124 (2009). *See also* Barton Gellman & Jo Becker, *Pushing the Envelope on Presidential Power*, Washington Post, 25 June 2007.

[30] Memo from White House Counsel Alberto Gonzales to President George W. Bush, *Decision Re: Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban* (25 January 2002).

[31] *Id*.

noted that the positive "consequences" of such a determination included: eliminating the need to determine the prisoner of war status of detainees on a case-by-case basis; leaving open "options for the future"; and reducing the threat of prosecution under the US War Crimes Act.[32]

Ultimately, on the direct basis of the defendants' legal advice, President Bush signed a 7 February 2002 memorandum stating that the Third Geneva Convention did not apply to the conflict with al Qaeda and that Taliban detainees would not be entitled to prisoner of war status, or any of the legal protections afforded by the Convention, not even under Common Article 3.[33] As we now know, and as was anticipated, this decision led to the torture and other serious abuse of countless detainees.

2. Aiding and Abetting Torture and War Crimes – Illustration in Light of the Defendants' Memos

Since Nuremberg, international criminal law has significantly developed. The extensive jurisprudence of the *ad hoc* International Criminal Tribunals for former Yugoslavia and Rwanda, and the codification of the Rome Statute creating the International Criminal Court, have set forth several elaborated modes of individual criminal liability under which government lawyers can be prosecuted. Those developments are fundamental because they are based on international treaty and customary law that both Spain and the United States are bound by.[34]

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[32] In regard to the application of the War Crimes Act (18 U.S.C. § 2441), it is clear that what defendant Gonzales sought to afford U.S. actors who participated in war crimes, including torture, was immunity. Gonzales assesses the resulting impunity as a "positive" factor for suspending the Geneva Conventions, opining that because the U.S. War Crimes Act defines "war crimes" as any grave breach or violation of Common Article 3 of the Geneva Conventions, a finding that the Geneva Conventions do not apply would *ipso facto* mean that the War Crimes Act would not apply – and thus no one could be prosecuted for committing war crimes against the detainees. ("A determination that the [Third Geneva Convention on the Treatment of Prisoners of War (GPW)] is not applicable to the Taliban would mean that Section 2441 would not apply to the actions taken with respect to the Taliban. Adhering to your [President Bush] determination that GPW does not apply would guard effectively against misconstruction or misapplication of Section 2441 for several reasons. […] it is difficult to predict the needs and circumstances that could arise in the course of the war on terrorism…it is difficult to predict the motives of prosecutors and independent counsels who may in the future decide to pursue unwarranted charges based on Section 2441. Your determination would create a reasonable basis in law that Section 2441 does not apply, which would provide a solid defense to any future prosecution.")

[33] Memo from George W. Bush to the Vice President, Secretary of State, Secretary of Defense, Attorney General et. al., *Decision Re: Humane Treatment of Taliban and al-Qaeda* (7 February 2002), *available at* http://www.pegc.us/archive/White_House/bush_memo_20020207_ed.pdf.

[34] In particular, international customary law provides that all States must at all times respect *jus cogens* norms for which no derogation is ever justified. These peremptory norms include international crimes such as torture, war crimes, or crimes against humanity. Treaty law obligations further arise from international documents such as the four Geneva Conventions, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the International Covenant on Civil and Political Rights, all of which are signed and ratified by Spain and the United States. Not only does international law have strong legitimacy in today's world order, but it carries legal obligations on States. In addition, in both Spain and the United States, international human rights law is recognized by domestic legislation and judicial precedents.

Aiding and abetting is a basic form of accomplice liability. Under virtually all modern legal systems, an individual can be held to account for a crime that he or she consciously assisted or encouraged the commission of. Elements to prove aiding and abetting include an act or omission – or *actus reus* (1) – accompanied by a criminal mental element – *mens rea* (2).

In our submissions, the crimes that the lawyers are accused of having aided and abetted include torture, cruel, inhuman or degrading treatment and grave breaches of the Geneva Conventions. The widespread abuses that were perpetrated against detainees held in the so-called "War on Terror" can no longer be questioned. They have been widely documented and confirmed by many American and international sources, including the United States military, Central Intelligence Agency and Congress, the UK House of Commons, the United Nations, and the International Committee of the Red Cross, as well as by the victims themselves.[35] For the purpose of this short legal opinion, we will therefore not extend our analysis to the actual perpetration and qualification of these crimes.[36] Instead, we focus on demonstrating how the elements of the offence of aiding and abetting are plainly met in this case.

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[35] *See, e.g.,* A. Taguba, Art. 15-6: Investigation of the 800th Military Police Brigade (2004), *available at* http://www.dod.mil/pubs/foi/detainees/taguba/ (citing instances of 'sadistic, blatant, and wanton criminal abuse' at Abu Ghraib); J. Schlesinger, Final Report of the Independent Panel to Review Department of Defense Detention Operations, August 2004, *available at* http://www.defenselink.mil/news/Aug2004/d20040824finalreport.pdf (abuses were 'widespread' and serious in numbers and effect); G. Fay & A. Jones, US Army, AR 15-6 Investigation of Intelligence Activities At Abu Ghraib Prison and 205th Military Intelligence Brigade (2004), *available at* http://www.washingtonpost.com/wp-srv/nationi/documents/fay_report_8-25-04.pdf; Report of the ICRC on the Treatment by the Coalition Forces of Prisoners of War and other Protected Persons by the Geneva Conventions in Iraq during Arrest Internment and Interrogation, February 2004, *available at* http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq_feb2004.pdf; Central Intelligence Agency, Office of the Inspector General. Special Review: Counterterrorism Detention and Interrogation Activities, 7 May 2004 [hereinafter CIA IG Report], *available at*: http://luxmedia.com.edgesuite.net/aclu/IG_Report.pdf; Senate Armed Services Committee, Inquiry into the Treatment of Detainees in U.S. Custody, 20 November 2008, *available at* http://armed-services.senate.gov/Publications/Detainee%20Report%20Final_April%2022%202009.pdf; US Department of Justice, Office of Professional Responsibility, Investigation Into The Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" On Suspected Terrorists 15 (2009) [hereinafter OPR Report], *available at* http://judiciary.house.gov/hearings/pdf/OPRFinalReport090729.pdf*;* UN Economic and Social Council, Commission on Human Rights, Situation of detainees at Guantánamo Bay*,* 27 February 2006*, available at* http://www.unhcr.org/refworld/country,,UNCHR,,CUB,,45377b0b0,0.html ; House of Commons Foreign Affairs Committee, Human Rights Annual Report 2005, Session 2005-6, H.C. 574, *available at* http://www.publications.parliament.uk/pa/cm200506/cmselect/cmfaff/574/574.pdf; Decl. of Gitanjali S. Gutierrez, Esq., Lawyer for Mohammed al Qahtani, Criminal Complaint Against Donald Rumsfeld, The Prosecutor General at the Federal Supreme Court, Federal Republic of Germany (filed 14 November 2006), *available at* http://ccrjustice.org/files/Gutierrez%20Declaration%20re%20Al%20Qahtani%20Oct%202006_0.pdf. *See also* Physicians for Human Rights, Broken Laws, Broken Lives: Medical Evidence of Torture by US Personnel and Its Impact (June 2008), *available at* http://brokenlives.info/?page_id=69; Report on Torture and Cruel, Inhuman and Degrading Treatment of Prisoners at Guantánamo Bay, Cuba, July 2006, *available at* http://www.ccrjustice.org/files/Report_ReportOnTorture.pdf.

[36] Should Your Honour find an Expert Opinion on this issue of assistance, we can readily seek to provide this Court with the requested information.

2.1. The Guilty Act: *Actus Reus* of Aiding and Abetting

The elements of *actus reus* for aiding and abetting under international law is provided by the International Criminal Tribunal for former Yugoslavia (ICTY). The ICTY has found that under customary international law "an aider and abettor carries out acts specifically directed to assist, encourage, or lend moral support to the perpetration of a certain specific crime, which have a substantial effect on the perpetration of the crime."[37] However, the assistance need not be the *sine qua non* of the principal's crime.[38]

Were the government memos specifically directed to assist crimes and did they have a substantial effect on them?

2.1.1. Specific Assistance and Substantial Effect on Grave Breaches of the Geneva Conventions

As explained above, on the basis of defendants Yoo, Bybee, and Gonzales' misconstrued opinions, which benefits from the contribution of defendant Addington, President Bush signed a memorandum suspending the application of the Third Geneva Convention and Common Article 3 to al Qaeda and the Taliban on 7 February 2002.

The defendants' memos had been written to the attention of either the highest counsels in the government (defendants Haynes or Gonzales) or of President Bush himself. Because their ultimate advice was that the President suspend the Third Geneva Convention, the defendants' acts were indeed specifically directed to assist the approval of not only a new foreign policy but also the commission of crimes. In his 2-page memorandum, the President of the United States stated that he had come to the conclusion to suspend Geneva Convention protections by: "relying on the opinion [of Bybee] of the Department of Justice dated January 22, 2002, and on the legal opinion rendered by the attorney general [John Ashcroft]in his letter of February 1, 2002". The Memorandum reads as follows:

> I accept the legal conclusion of the Department of Justice that none of the provisions of Geneva apply to our conflict with al Qaeda …
> I accept the legal conclusion of the attorney general and the Department of Justice that I have the authority under the Constitution to suspend Geneva…

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[37] *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Appeal Judgment, 9 May 2007, para. 127 [hereinafter *Blagojević* and *Jokić* Appeal Judgment]. *See also Prosecutor v. Vasiljević*, Case No. IT-98-32-A, Appeal Judgment, 25 February 2004, para. 102; *Prosecutor v. Furundžija,* Case No, IT-95-17/1-T, Trial Judgment, 10 December 1998, para. 235, 249 [hereinafter *Furundžija* Trial Judgment]. *See also* Rome Statute of the International Criminal Court, July 17, 1998, art. 25, U.N. Doc. A/CONF. 183/9.

[38] *See, e.g*., *Prosecutor v. Mrkšić and Šiljivančanin,* Case No. IT-95-13/1-A, Appeal Judgment, 5 May 2009, para. 81 ("There is no requirement of a cause-effect relationship between the conduct of the aider and abettor and the commission of the crime or that such conduct served as the precedent to the commission of the crime.")

> I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply…
> Based on the facts supplied by the Department of Defense and the recommendation of the Department of Justice, I determine that the Taliban are unlawful combatants and, therefore, do not qualify as prisoners of war.[39]

Bush's memo had an immense and direct impact on the apprehension and treatment of detainees in the context of the war in Afghanistan and the War on Terror. The bipartisan Senate Armed Services Committee 2008 investigative report on detainee abuse's first conclusion was: "Following the President's determination [of 7 February 2002], techniques such as waterboarding, nudity, and stress positions … were authorized for use in interrogations of detainees in U.S. custody."[40]

In the context of the White House's reliance on the defendants' opinions to justify a policy which led to, and should have foreseen, the commission of international crimes, it cannot be questioned that the "advice" of the lawyers was directed to assist and substantially contributed to the commission of crimes. More than that, the defendants' actions represented a significant step towards violations of the most basic rules of warfare.

2.1.2. More Specific Assistance and Substantial Effect on Torture – the two 1 August 2002 Memoranda

Later that year, two critical memoranda were issued on 1 August 2002 by the Office of Legal Counsel (OLC) of the Department of Justice. They were signed and reviewed by defendant Jay Bybee and written by defendant John Yoo. The first memo, the *First Bybee Memo* (or sometimes referred to as "the *Torture Memo*"),[41] was requested by defendant Gonzales and addressed to him. It was written in response to concerns from CIA officials that interrogation techniques to be used against high-level al Qaeda detainees trigger criminal responsibility for torture. The second one, "Interrogation of al Qaeda Operative", or the *Second Bybee Memo*, was addressed to the CIA General Counsel John Rizzo and intended to provide legal justification for the CIA to use ten specific interrogation techniques – including waterboarding – on detainee Abu Zubaydah.[42]

The two memos raised so much uproar that the American government investigated Yoo and Bybee's professional misconduct in writing these opinions. The Department of Justice's Office

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[39] *See supra* n. 33.

[40] Senate Armed Services Report, *supra* n. 27, at xxvi.

[41] Memorandum from Jay S. Bybee, the Dep't of Justice Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, *Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A*, *available at* http://fl1.findlaw.com/news.findlaw.com/wp/docs/doj/bybee80102mem.pdf.

[42] Jay S. Bybee, Assistant Attorney General, U.S. Department of Justice, Office of Legal Counsel, Memorandum for John Rizzo, Acting General Counsel of the Central Intelligence Agency, *Interrogation of al Qaeda Operative*, 1 August 2002, *available at* http://luxmedia.com.edgesuite.net/aclu/olc_08012002_bybee.pdf.

of Professional Responsibility issued a 261-page long investigative report, declassified in February 2010, finding that the defendant did commit professional misconduct.[43]

i) The "binding" nature of the OLC memos implies assistance and substantial effect

To understand why these memos carried a direct and substantial impact on the commission of torture, one must understand the very fundamental role played by the OLC within the US government. The OLC's official description reads as "All Executive orders and proclamations proposed to be issued by the President are reviewed by the Office of Legal Counsel for form and legality, as are various other matters that require the President's formal approval."[44] More specifically, as stated by the Department of Justice, the OLC has "the function of providing *authoritative* legal advice to the President and all the Executive Branch agencies. … OLC opinions are *binding* on the Executive Branch." [45] (emphasis added).

As such, a legal opinion from the OLC, particularly on a sensitive matter especially and in response of a specific request, will have a substantial effect on a given course of conduct. Not only is it likely to, but it is the very purpose of the opinion to directly assist and substantially impact conduct. In this case, the two 1 August 2002 memos sought to secure the authorization of an illegal conduct.

ii) The First Bybee Memo authorized a torture program

The First Bybee Memo, in complete and utter disregard of correct interpretations of the law, relevant precedents, and international obligations, argued that:

- The prohibition of torture is to be read so narrowly so as to prohibit only acts inflicting pain equivalent to major organ failure or death (at 13);[46]
- The Convention Against Torture "prohibits only the worst forms of cruel, inhuman, or degrading treatment or punishment." (at 14);

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[43] *See* OPR Report, *supra* n. 35.

[44] http://www.usdoj.gov/olc/.

[45] OPR Report, *supra* n. 35, at 15. Note that this investigation, which was not a criminal investigation, did find the defendants guilty of professional misconduct, but its finding was overruled by Associate Deputy Attorney General Margolis in a 5 January 2010 memo, preventing the OPR to refer its finding to the state bar disciplinary authorities. Memo from US Deputy Attorney General David Margolis to the US Attorney General Eric Holder, *Decision Re: the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists* (5 January 2010), *available at* http://judiciary.house.gov/hearings/pdf/DAGMargolisMemo100105.pdf.

[46] In the First Bybee Memo, both the physical and mental thresholds for torture were heightened: physical pain 'must be equivalent in intensity to the pain accompanying serious physical injury, such as organ failure, impairment of bodily function, or even death', while mental pain 'must result in significant psychological harm of significant duration, e.g. lasting for months or even years'. *See supra* n. 41.

- The President's Commander-in-Chief powers means that he can authorize torture – and that any statute that would have "impermissibly encroached on the President's constitutional power to conduct a military campaign" would be unconstitutional (at 31);
- Even if an interrogation technique violates the torture statute and even if this statute was deemed constitutional, "standard criminal law defenses of necessity and self-defense could justify interrogation methods…" (at 39).

Harold Koh, then Dean of Yale Law School, and today Legal Adviser of the US Department of State, wrote of that Memo:

> In sum, the August 1, 2002 Bybee Opinion is a stain upon our law and our national reputation. A legal opinion that is so lacking in historical context, that offers a definition of torture so narrow that it would have exculpated Saddam Hussein, that reads the Commander-in-Chief power so as to remove Congress as a check against torture, that turns Nuremberg on its head, and that gives government officials a license for cruelty…[47]

The First Bybee Memo met the requisite *actus reus* of aiding and abetting as it directly assisted and had a substantial effect on crimes. In fact, it led to a program of torture. In 2009, the US Department of Justice's Office of Professional Responsibility (OPR), in its disciplinary investigation into the professional misconduct of defendants Yoo and Bybee, concludes:

> The Bybee Memo had the effect of authorizing a program of CIA interrogation that many would argue violated the torture statute, the War Crimes Act, the Geneva Convention, and the Convention Against Torture, and Yoo's legal analyses justified acts of outright torture under certain circumstances. … Bybee's signature, which added greater authority to the memoranda, carried with it a significant degree of personal responsibility.[48]

iii) The Second Bybee Memo secured the torture of Zubaydah and other CIA detainees

In the Second Bybee Memo, relying heavily on the conclusions of the First Bybee Memo, Yoo and Bybee analyzed whether the ten enhanced interrogation techniques the CIA requested approval for use on current detainee Abu Zubaydah, violated the prohibition against torture. The ten techniques were: "(1) attention grasp, (2) walling, (3) facial hold, (4) facial slap (insult slap), (5) cramped confinement, (6) wall standing, (7) stress positions, (8) sleep depravation, (9) insects placed in a confinement box, and (10) the waterboard."[49]

The defendants, ignoring or rejecting accepted legal standards, concluded that:

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[47] Harold Koh, *World Without Torture*, 43 Colum. J. Transnat'l L. 641, 654. Today, Koh, in his capacity as Department of State's Legal Adviser affirmed that "the definition of torture that permitted certain activities was drawn from a 2002 opinion of the Office of Legal Counsel at the Justice Department." *See* "Press Conference by the U.S. Delegation to the UPR (Transcript)", 5 November 2010, *available at* http://geneva.usmission.gov/2010/11/05/upr-press-conf/.

[48] OPR Report, *supra* n. 35, at 251-252.

[49] *See supra* n. 42, at 2.

- None of the proposed techniques, when used in isolation, inflict severe physical pain or severe mental pain or suffering (at 10 and 12);
- "Even when all of these methods are combined in an overall course of conduct, they still would not inflict severe physical pain or suffering" (at 11);
- "Even if the course of conduct were thought to pose a threat of physical pain or suffering, it would nevertheless—on the facts before us—not constitute a violation of Section 2340A, [since n]ot only must the course of conduct be a predicate act, but also those who use the procedure must actually cause prolonged mental harm" (at 16).

The CIA Inspector General acknowledged the substantial impact of that memo saying it "provided the foundation for the policy and administrative decisions that guided the CTC [Counterterrorist Center] Program."[50]

In fact, the techniques approved resulted in the torture of Abu Zubaydah, a detainee who was first painted by the Bush administration as a "very senior al Qaeda operative",[51] but whom the US government now admits is not an al Qaeda fighter or partner.[52] Evidence later declassified revealed that Abu Zubaydah, who is still detained without charges in Guantánamo, was tortured in numerous ways, including being waterboarded at least 83 times.[53]

The Second Bybee Memo not only resulted in the torture of Abu Zubaydah, it was also used by the CIA to authorize the torture of other detainees. As the CIA Inspector General noted, the CIA understood that "the classified 1 August 2002 OLC opinion [Second Bybee Memo] extend[ed] beyond the interrogation of Abu Zubaydah and the conditions that were specified in that opinion."[54] Examples of the torture of CIA detainees occurring after the issuance of the Second Bybee Memo are reported in the CIA Inspector General report and include the torture of Khalid Sheikh Mohammed, subjected to psychological torture in addition to having been waterboarded 183 times.[55]

While some of the reported torture went beyond the OLC's (already illegal) guidelines, the Second Bybee Memo, by allowing specific acts of torture, created a permissive and exceptional

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50 CIA IG Report, *supra* n. 35, at 4.

51 Donald Rumsfeld *News Transcript* Department of Defense, 3 April 2002, *available at* http://www.defense.gov/transcripts/transcript.aspx?transcriptid=3390.

52 *Zayn al Abidin Muhammad Husayn v. Robert Gates*, Respondent's Memorandum of Points and Authorities in Opposition to Petitioner's Motion for Discover and Petitioner's Motion for Sanctions. Civil Action No. 08-cv-1360 (RWR) (September 2009), *available at* http://www.truth-out.org/files/memorandum.pdf.

53 CIA IG Report, *supra* n. 35, at 36-37.

54 *Id.* at 23

55 *Id.* at 41-44.

environment, which contributed to further acts of torture within the CIA detention centers. Ultimately, these activities led to at least two reported deaths of detainees under CIA custody.[56]

2.2. The Guilty Mind: *Mens Rea* of Aiding and Abetting

The strictest standard for the mental element of *mens rea* for aiding and abetting liability is contained in Article 25 of the Rome Statute, requiring that the *mens rea* be "stricter than mere knowledge."[57] Under the Rome Statute, an individual must act "for the purpose of facilitating" the commission of the crime. This differs from the ICTY which requires "knowledge" that one is aiding and abetting a crime.[58] The ICTY Appeals Chamber held: "[t]he requisite mental element of aiding and abetting is knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator."[59]

Did the defendants, in the memos described above, know their actions were assisting the commission of specific crimes and did they act with the purpose of facilitating the perpetration of crimes?

2.2.1. Knowledge: The Defendants Knew their Opinions Assisted Crimes

i) Defendants knew the great authoritative power of any opinion emanating from their offices

As explained above, the purpose of any legal opinion issued by the OLC, or the White House Chief Counsel for that matter, is to effect specific conduct by orienting it in a certain direction -- normally towards lawfulness. When the defendants chose to advise criminal conduct, they did so knowing that because of their positions, their advice would have a significant impact, and knew such advice would lead to commission of criminal acts.

ii) Defendants were put on notice that a legal "green light" was needed

The defendants knew their legal opinions were sought in an effort to obtain a green light for extraordinary – and otherwise illegal – policies. In the case of the Second Bybee Memo, for instance, the defendants knew their opinion had been requested to give legal approval – or rather

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[56] *Id.* at 69, 78.

[57] Kai Ambos et al., *Commentary on the Rome Statute of the International Criminal Court: Observers Notes, Article by Article* 475-492, 483 (Otto Triffterer Baden Baden ed., Nomos 1999).

[58] It is recalled that the ICTY applies customary international law, *see Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808*, S/25704, 3 May 1993, para. 34, while the ICC is not required to do so.

[59] *Blagojević* and *Jokić* Appeal Judgement, *supra* n. 37, para. 127. *See e.g., Prosecutor v. Brđanin,* Case No, IT-99-36-A, Appeal Judgment, 3 April 2007, para. 484 [hereinafter *Brđanin* Appeal Judgment]; *Furundžija* Trial Judgment, *supra* n. 37, para. 245; *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10-A & ICTR-96-17-A, Appeal Judgment, 13 December 2004, para. 501.

legal cover – for ten techniques to be used on a specific individual. The Department of Justice itself indicated that "the CIA did not expect just an objective, candid discussion of the meaning of the torture statute. Rather … the agency was seeking maximum legal protection for its officers"[60] and clearly had conveyed this message to the defendants.

2.2.2. Criminal Intent: The Defendants Intended to Facilitate Crimes

i) Criminal intent: the defendants knowingly distorted the law for a criminal purpose

Because the legal opinions issued by individuals holding the offices of the defendants will not be reviewed by the courts, and are sometimes to remain classified and therefore free from challenge, only highly qualified lawyers are intended to occupy positions in OLC, in order to ensure that thorough, carefully considered and objective advice be given.

Yet, the deep flaws found in the purported legal reasoning of the memos upon their leakage to the press caused national and international outcry amongst lawyers of all backgrounds, appalled by the distorted reasoning and weak, unsupported conclusions that were reached.[61] To only take the example of the First Bybee Memo, on which the Second Bybee Memo relied, Daniel Levin, who later had Bybee's position as the head of the OLC in 2004, said he read the memo and thought "this is insane, who wrote this?"[62] Jack Goldsmith, head of the OLC between Bybee and Levin, said he found the memo "riddled with error" with key portions being "plainly wrong" and revealing a "one-sided effort to eliminate any hurdles posed by the torture statute."[63]

The Department of Justice's OPR investigation into Yoo and Bybee draws an especially damning assessment of their work. It states that it found the various memos "seriously deficient"[64] and especially "found errors, omissions, misstatements, and illogical conclusions in the [First] Bybee Memo."[65] Sources were "exaggerated or misrepresented", "adverse authority was not discussed" and some arguments were "illogical or convoluted."[66]

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60 OPR Report, *supra* n. 35, at 226.

61 In August 2004, a group of more than 130 prominent American lawyers – including judges, law school deans, or former elected officials – issued the "Lawyer's Statement on Bush Administration's Torture Memos" the Bush Administration. It condemned memoranda "concerning the war powers of the President, torture, the Geneva Convention Relative to the Treatment of Prisoners of War (Geneva Convention) . . . and related matters," stating they "ignore and misinterpret the U.S. Constitution and laws, international treaties and rules of international law." *Lawyers' Statement on Bush Administration's Torture Memos*, to President George W. Bush, Vice President Richard B. Cheney, Secretary of Defense Donald Rumsfeld, Attorney General John Ashcroft, Members of Congress, 4 August 2004.

62 OPR Report, *supra* n. 35, at 160.

63 *Id*. at 160.

64 *Id*.

65 *Id*. at 159.

66 *Id*. at 230.

In light of the defendants' professional qualifications – Yoo, for example, was a tenured law professor at a top-ten U.S. law school and a former clerk of the US Supreme Court – it is not possible to conclude that such deeply flawed, unsupported and misguided analysis was simply the result of poor judgment or an inexperienced lawyer asked to opine on an issue beyond his or her expertise. Instead, the distorted approach used in their memos was consciously, intentionally, biased.

Based on a "preponderance of the evidence", the OPR found that Yoo, by his participating in drafting the First Bybee memo, "knowingly provided incomplete and one-sided advice", "knowingly failed to present a sufficiently thorough, objective, and candid analysis", "knowingly provided incomplete advice to the client", "knowingly misstated", and "knowingly misrepresented the authority."[67]

In addition, when the memos were not kept completely secret, the lawyers were put on notice of their major reasoning flaws by others within the administration. Two days after the issuance of Yoo's 9 January 2002 memo on the suspension of the Geneva Convention, the Chief Legal Adviser of the State Department, William Taft IV, sent a detailed memo to Yoo opposing his conclusions and putting him on notice that "both the most important factual assumptions on which [the] draft [memorandum] is based and its legal analysis are seriously flawed"[68] and that a US refusal to abide by the Geneva Conventions could constitute a "grave breach."[69] In fact, Taft warned Yoo that "*criminal responsibility attaches* to the commission of grave breaches of the Convention."[70] He also issued a 2 February 2002 memo to defendant Gonzales opposing his legal arguments and encouraging him to recommend the application of the Geneva Conventions stating that a decision, as required under international law, to abide by the Geneva Conventions would signal "that even in a new sort of conflict the United States bases its conduct on its international treaty obligations and the rule of law, not just its policy preferences."[71] Tellingly, four years later, the United States Supreme Court, in *Hamdan v. Rumsfeld*,[72] found that the Geneva Conventions did in fact apply to al Qaeda. But none of the internal warnings at the time had any impact on the legal positions adopted by the defendants. It only adds to the evidence that they knew, as was found by the OPR investigation, that their analyses were flawed as a matter of law—and yet stood by that legal "advice".

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67 *Id*. at 251-254.

68 William H. Taft, IV, Draft Memorandum to John C. Yoo (11 January 2002) (copies to Secretary of State and then White House Counsel Gonzales), cover letter at 1.

69 *Id*. at 2.

70 *Id*. at 30

71 Memorandum from William H. Taft, IV, The Legal Adviser, Department of State, to Alberto R. Gonzales, Counsel to the President, Comments on Your Paper on the Geneva Convention (2 February 2002), *available at* http://www.texscience.org/reform/torture/taft-2feb02.pdf.

72 548 U.S. 557 (2006).

ii) Defendants knew the end result would be criminal

In establishing *mens rea*, the ICTY explains that "it is not necessary that the aider and abettor should know the precise crime that was intended . . . [instead,] if he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor."[73]

In light of all the information above, the defendants were well aware that crimes – at a minimum the inhuman treatment of detainees, and at worst torture and killings – were the foreseeable and natural consequences of their legal advice. The OPR report states:

> We also found evidence that the OLC attorneys were aware of the result desired by the client and drafted memoranda to support that result. …
> According to Rizzo [former CIA General Counsel], there was never any doubt that waterboarding would be approved by Yoo, and the client clearly regarded OLC as willing to find a way to achieve the desired result.[74]

In fact, the Second Bybee Memo was directly prescribing in appalling details the torturous acts to be conducted on Abu Zubaydah. Not only the defendants knew the result of what they were supporting was criminal, they actively found ways to ensure the result (the legal cover) would be achieved.[75]

iii) The Defendants' attempts to prevent future prosecutions of officials revealed their intent to facilitate crimes

The work of the defendants attempted to provide a legal justification and pre-emptive legal cover or defense for potential criminal prosecutions that could arise out of torture committed by government officials. It was made clear from the start that the August memos, for instance, were to provide a legal shield against the prosecution of CIA officials.

"Immediately after" the Department of Justice Criminal Division refused to "provide an advance declination of prosecution [of US officials] for violations of the torture statute,"[76] Yoo conveniently added to the First Bybee Memo the sections on the overriding powers of the Commander-in-Chief and on defenses of torture, thereby attempting to provide a blanket

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[73] *Furundžija* Trial Judgment, *supra* n. 37, para. 249. *See also Blagojević* and *Jokić* Appeal Judgment, *supra* n. 37, para. 127 (aiding and abetting requires "knowledge that the acts performed assist the commission of the specific crime of the principal perpetrator").

[74] OPR Report, *supra* n. 35, at 226, 227.

[75] *See* law professor David Cole: "When considered as a whole, the memos reveal a sustained effort by the OLC lawyers to rationalize a predetermined and illegal result", in David Cole, *The Torture Memos: The Case Against the Lawyers*, The New York Review of Books 56:15, 8 October 2009.

[76] OPR Report, *supra* n. 35, at 228

immunity to CIA officers engaged in torture, as he knew the power of an OLC opinion. Jack Goldsmith, the OLC successor of Bybee, argued in his 2007 book "The Terror Presidency":

> If OLC interprets a law to allow a proposed action, then the Justice Department won't prosecute those who rely on the OLC ruling. ... It is one of the most momentous and dangerous powers in the government: the power to dispense get-out-of-jail-free cards…. and thus effectively to immunize officials from prosecutions for wrongdoing.[77]

However, attempting to immunize torturers is a violation of domestic and international law because the law is clear (whether in the treaties directly or as *jus cogens* norms) that no derogation can ever justify the use of torture or the commission of war crimes. Assuring American officials that they would not get prosecuted for their criminal actions is a direct illustration of intent to promote and facilitate crimes.

Clearly, there is ample evidence warranting the opening of a criminal investigation into the personal liability of defendants named in the Bush Six case for aiding and abetting crimes.

3. Joint Criminal Enterprise: Enabling Torture and Other Crimes

In the Bush Six case, various sources demonstrate that at least some of the defendants shared intent to achieve a specific purpose: the commission of torture and other international law violations upon detainees in U.S. custody. In this context, it is worth examining some additional facts in light of another liability theory: joint criminal enterprise (JCE).

The ICC Rome Statute states that an individual is criminally responsible for a crime if he commits, orders, or aids and abets the crime, or "[i]n any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose."[78] JCE is a mode of liability whereby members are attributed with criminal culpability for crimes committed in furtherance of a common purpose, or crimes that are a foreseeable result of undertaking a common purpose.[79]

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[77] Jack Goldsmith, *The Terror Presidency* 96 (W.W. Norton 2007).

[78] Rome Statute of the International Criminal Court, Art 25. Joint criminal enterprise is not explicitly provided for in the ICTY Statute. However, the ICTY Appeals Chamber provided the *opinio iuris* that participation in the joint criminal enterprise is included in the Statute as a form of "commission" under Article 7(1) of the Statute and that there is a basis for this theory of liability under customary international law. *See Prosecutor v. Tadić,* Case No. IT-94-1-A, Appeal Judgment, 15 July 1999 [hereinafter *Tadić* Appeal Judgment].

[79] The ICTY Appeals Chamber first recognized joint criminal enterprise as a mode of liability under customary international law in *Tadić* Appeal Judgment, *supra* note 78, paras 189-229. *See also Brđjanin* Appeal Judgment, *supra* n. 59, para. 430; *Prosecutor v. Martić*, Case No. IT-95-11-A, Appeal Judgment, 8 October 2008, paras. 80-81.

Joint criminal enterprise is considered a form of "committing," included in Article 6.1 of the SCSL Statute. *Prosecutor v. Sesay, Kallon, and Gbao*, Case no. SCSL-04-15-T, Trial Judgment, 2 March 2009, para. 252.

To hold an individual liable under JCE it must be shown that (1) a *group of people* (2) had a *common plan, design, or purpose* to commit a crime, (3) that the defendant *participated in some way* in the plan, and that (4) the defendant *intended the aim of the common plan*. If these elements satisfied, the accused are guilty of the completed crimes.

3.1. A Group of Persons

According to the ICTY, the persons need not be organized in a military, political or administrative structure and each member in the JCE does not need to be identified by name: "it can be sufficient to refer to categories or groups of persons."[80]

In the case of the Bush Six, it is not difficult to identify a group of persons involved. Investigative reports have revealed that, shortly following the 9/11 attacks, a very small high level group of government lawyers from various agencies, four of which are defendants in the Bush Six case, were meeting on a regular but informal basis to discuss legal options in the context of the War on Terror. Defendant Haynes, the Department of Defense General Counsel, called it the "War Council."[81] Sources have said that defendant Addington, Vice President Cheney's Counsel, was the dominant force amongst the attorneys.[82] The Senate's bipartisan 18-month inquiry into the abuse of detainees explained:

> Addington met "regularly" with a group of lawyers that included DoD General Counsel Jim Haynes, White House Counsel Alberto Gonzales, and the CIA General Counsel John Rizzo. This group that met regularly - which Mr. Addington said was referred to as the "War Council" by Mr. Haynes - also included OLC lawyers John Yoo and Tim Flanigan. According to Mr. Addington, the group of lawyers met about a "range of issues," including interrogation of enemy combatants in the war on terror.[83]

These meetings usually took place in defendant Gonzales' office.

3.2. A Common Plan

In light of the ICTY *Tadić* Appeal Judgment, the plan need not to "have been previously arranged or formulated," in fact, "the common plan or purpose may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise."[84]

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80 *Prosecutor v. Krajišnik,* Case No. IT-00-39-A, Appeal Judgment, 17 March 2009, para. 156.

81 *See* Michael P. Scharf, *Accountability for the Torture Memo: International Law and the Torture Memos*, 42 Case W. Res. J. Int'l L. 321, 346 n.141 (2009). Scharf refers to the group as "a like-minded cabal of aggressive lawyers calling themselves the "war council"" at 355.

82 Philippe Sands, *The Torture Team* 213 (2008).

83 Senate Armed Services Report, *supra* n. 27, at 31-32 n.224.

84 *Tadić* Appeal Judgment, *supra* n. 78, para. 227 (ii).

In this case, it appears that the plan materialized through a series of meetings and writings amongst like-minded government attorneys ready to push an agenda forward in the context of developing events. The lawyers were working at the direction of, and in apparent coordination with, other members of the Bush administration, including the president himself. The plan was to provide *legal cover that would enable the authorization of interrogation techniques amounting to torture* or cruel, inhuman or degrading treatment to be used on detainees captured in the context of the "War on Terror", whether in Guantánamo, Afghanistan, Iraq, or other locations, including secret sites.

3.3. The Guilty Act: Participation in the Common Plan or *Actus Reus*

Participation in the common design does not require participation in the commission of the criminal acts and can include assistance or contribution to the common plan or purpose. The assistance does not have to have a substantial effect on the commission of the crime: "it is sufficient for the participant to perform acts that in some way are directed to the furthering of the common plan or purpose."[85]

Defendants participated in the furtherance of the plan through various ways, and most notably through the writing of the legal opinions mentioned above, but also through a series of coordinated acts undertaken to ensure that the plan would succeed. In this regard, defendant Haynes played a particularly telling role with regards to torture applied by the military, as was revealed in great details by the SASC Report on detainee abuse.

In December 2001, defendant Haynes sought information on the techniques (including waterboarding) that constitute torture used by the US Joint Personnel Recovery Agency (JPRA) in its Survival Evasion Resistance and Escape (SERE) course given to US soldiers learning how to resist torture by enemies' forces not respecting the Geneva Conventions.[86] Haynes sought out this information for two purposes that furthered the JCE: 1) to provide the list of techniques to other members of the JCE who could tailor legal analysis to permit these techniques – which included getting rid of the Geneva Conventions obligations and 2) to create new and violent interrogation methods for use on detainees. Haynes then requested Yoo's opinions of January 2002 on the (non-application of) the Geneva Conventions which led to Bush's order and enabled Haynes to start elaborating further on possible so-called "enhanced interrogation techniques." Later in the year, Haynes requested more specific information from JPRA in order to "reverse engineer" the techniques used in SERE – meaning to use them against detainees.[87] "Less than a week after JPRA sent the DOD General Counsel's Office its memorandum and attachments," the

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85 *Id*. at 229 (iii).

86 SASC Report, *supra* n. 27., at 4, 114.

87 *Id*. at 2, 116.

1 August 2002 two torture memos were signed by Bybee.[88]

Three months later, Hayne's office authorized the interrogation plans of Guantanamo detainee Mohammed al Qhatani, whose interrogation lasted from 23 November 2002 through 16 January 2003. The techniques were directly inspired by the SERE techniques and were later widely acknowledged as torture, including by a Military Commissions judge who, in 2009, dropped all charges against Qhatani due to the torture inflicted on him and approved by Haynes' office. The judge wrote: "we tortured al-Qahtani. … His treatment met the legal definition of torture. And that's why I did not refer the case for prosecution." [89]

On 27 November 2002, Haynes sent a memorandum to Secretary of Defense Donald Rumsfeld recommending that the Secretary authorize a list of techniques for use at Guantanamo.[90] A few days later, the list was approved by Rumsfeld and by 30 December 2002, Guantanamo interrogators were employing the torturous techniques on several detainees. Ultimately, even though Rumsfeld, under pressure from other government officials, officially rescinded his authorization a month a half later, the techniques quickly migrated to the US detention center of Bagram in Afghanistan and later that year reached the prison of Abu Ghraib in Iraq.

3.4. The Guilty Mind: *Mens Rea* of Joint Criminal Enterprise

The *mens rea* in JCE is the intent to perpetrate a specific crime. In light of the facts above, the intent of the defendant in pursing crimes is clearly demonstrated: the defendants actively and consciously pursued efforts over a long period of time to enable the use of torture on detainees.

While much more evidence could be pulled out from various sources – which we can provide to the Central Court 6 upon request – an additional element worth mentioning in relation to intent is the defendants' concerted efforts to exclude from their work and meetings government lawyers not willing to share their common criminal purpose. For instance, the Office of the Legal Adviser William Taft at the Department of State, which should have naturally been consulted and kept informed of all developments, was extraordinarily pushed aside by the defendants, from the very start of the design of the common plan. Taft himself explained:

> the Department of Justice lawyers were working separately with the lawyers at the Department of Defense to authorize certain departures from the Conventions' terms in the treatment of the detainees, particularly with regard to methods of interrogation. I and my staff were not invited to review this work and we were, indeed, unaware that it was being done. …

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88 *Id*. at 31.

89 Bob Woodward, *Detainee Tortured, Says U.S. Official; Trial Overseer Cites "Abusive" Methods Against 9/11 Suspect*, Washington Post, 14 January 2009, at A1, *available at* www.washingtonpost.com/wp-dyn/content/article/2009/01/13/AR2009011303372.html.

90 Senate Armed Services Report, *supra* n. 27, at 95 (citing Committee staff interview of William J. Haynes II (25 April 2008) at 188.).

> It was highly regrettable that the Legal Adviser's Office was not involved in the legal work following the decisions in February 2002. I think that we were excluded because it was suspected, in light of some of the positions we had taken, that we would not agree with some of the conclusions other lawyers in the Administration expected to reach.[91]

Not only did the defendants exclude disagreeing voices, but they concealed voiced opposition from their superiors. For instance, when Haynes recommended that Secretary Rumsfeld approve a number of illegal techniques back in November 2002, he submitted a one-page memo omitting to mention the "serious concerns" raised by many officials that the techniques violate the prohibition on torture. Those concerns included formal legal objections and had been submitted to Haynes' office by the Air force,[92] Navy,[93] Marine Corps,[94] Army,[95] Federal Bureau of Investigation (FBI), and the DOD Criminal Investigation Task Force (CITF).[96]

Haynes also put to an end efforts made by other lawyers to review the legality of the techniques under the anti-torture obligations. Because of the "significant, significant concerns" about some of the techniques, Captain Dalton, the Legal Counsel to the Chairman of the Joint Chiefs of Staff (the armed forces' military lawyers group) requested a video-teleconference with representatives from various agencies to discuss their legal concerns, and began doing their own analysis.[97] Haynes ordered Captain Dalton and her staff to stop the analysis. Dalton reported that "Mr. Haynes wanted me ... to cancel the video teleconference and to stop" conducting the legal review because of concerns that "people were going to see 'the GTMO request and the military services' analysis of it."[98] According to Dalton, Haynes "wanted to keep it much more close hold."[99] Never before had Dalton been asked to stop analyzing a request that came to her for review.[100]

These examples perfectly demonstrate the intent to pursue the criminal common purpose to its end.

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91 Testimony obtained by and cited in Scharf, *supra* n. 81, at 346 n.141

92 Senate Armed Services Report, *supra* n. 27, at 67.

93 *Id.* at 68

94 *Id.*

95 *Id.*

96 *Id.* at 69.

97 *Id*. at 70.

98 *Id*. at 71.

99 *Id*. (citing Committee staff interview of RADM Jane Dalton (10 April 2008) at 35).

100 *Id*. (citing SASC Hearing (17 June 2008)).

Conclusion:

The bipartisan Senate Armed Services Committee inquiry unequivocally stated that the government lawyers "redefined the [anti-torture] law to create the appearance of [the techniques'] legality, and authorized their use against detainees," thereby "rationalized the abuse of detainees in U.S. custody."[101]

The legal cover – or blanket immunity – that the legal opinions aimed at achieving unfortunately so far has been successful. Indeed, as outlined in our earlier submission to this Court dated 14 December 2010, the Obama administration has chosen to only investigate a very limited number of abuse of detainees committed by the CIA agents who went *beyond* what was prescribed in the Bybee torture memos. Yet, even the Obama administration agrees that what those opinions prescribed were acts of torture. Whether the current US Attorney General or the Legal Adviser of the Department of State, Obama officials have publicly acknowledged that waterboarding, for instance, is torture. Harold Koh, as recently as last November 2010, affirmed at the United Nations, "the Obama administration defines waterboarding as torture as a matter of law under the Convention against Torture. It's part of our legal obligation."[102] Despite this, the US administration has refused to criminally investigate either the acts of torture perpetrated as prescribed by the memos, or the government lawyers for designing, encouraging, facilitating and approving these crimes as well as for paving the way for foreseeable additional crimes being committed.

While the OPR disciplinary investigation concluded that Yoo and Bybee in fact engaged in "intentional professional misconduct", no disciplinary action was taken because the OPR's finding was ultimately overruled in a very weakly argued January 2010 memo by Associate Deputy Attorney General David Margolis.[103]

The legal analysis written in light of the facts chosen and detailed in this opinion demonstrates two important points: 1) the law and the facts make it clear that the standards required to open a criminal investigation into the conduct of the Bush Six have been met, and that 2) there is a significant amount of evidence incriminating the defendants that is publicly available.

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[101] Senate Armed Services Report, *supra* n. 27, at xii, xxvi-xxvii.

[102] US Press Conference at United Nations in Geneva, 5 November 2011, *available at* http://geneva.usmission.gov/2010/11/05/upr-press-conf/.

[103] *See supra* n. 45. For an analysis of Margolis' memo overruling the OPR Report, *see* David Cole, *The Sacrificial Yoo: Accounting for Torture in the OPR Report*, Georgetown Public Law and Legal Theory Research Paper No. 10-73, 2010, *available at* http://scholarship.law.georgetown.edu/facpub/477.

CCR and ECCHR stand ready to provide the Court with any additional documentation, analyses, or opinions relevant to the case, and in support to the plaintiffs.